

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 35991

STATE OF IDAHO,	)	2010 Unpublished Opinion No. 302
	)	
Plaintiff-Respondent,	)	Filed: January 8, 2010
	)	
v.	)	Stephen W. Kenyon, Clerk
	)	
LAMBERTO HOMERO OVIEDO,	)	THIS IS AN UNPUBLISHED
	)	OPINION AND SHALL NOT
Defendant-Appellant.	)	BE CITED AS AUTHORITY
	)	

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Appeal from the District Court of the Third Judicial District, State of Idaho, Canyon County. Hon. Gregory M. Culet, District Judge.

Order denying motion to suppress, reversed.

Molly J. Huskey, State Appellate Public Defender; Eric D. Fredericksen, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Jennifer E. Birken, Deputy Attorney General, Boise, for respondent.

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PERRY, Judge Pro Tem

Lamberto Homero Oviedo appeals from the judgment of conviction entered upon his Idaho Criminal Rule 11 guilty plea to possession of a controlled substance. Idaho Code § 37-2732 (c)(1). Pursuant to his conditional plea Oviedo challenges the district court's denial of his motion to suppress. We reverse the denial of Oviedo's motion and remand his case for further proceedings.

Idaho State Police Officer Justin Klitch stopped Oviedo after seeing him fail to signal for a turn and drive without wearing a seatbelt and noticing the rear license plate of his vehicle was obstructed. As Officer Klitch approached Oviedo's car he noticed Oviedo leaning down and reaching for something in the seat. Klitch told Oviedo to "show his hands." Upon contacting Oviedo, Officer Klitch noticed that Oviedo was extremely nervous and had bloodshot eyes and eyelid tremors. Suspecting Oviedo was driving under the influence Officer Klitch asked Oviedo to get out of his vehicle and specifically told him to keep his hands where Klitch could see them.

In response Oviedo again reached to the right side middle of the truck and began reaching for something. Officer Klitch and a back-up officer who had arrived for assistance drew their weapons and Klitch again ordered Oviedo to show his hands. Once Oviedo exited his vehicle he handed to Officer Klitch a rented movie and explained that it had been the item he was reaching for. He also stated he was on his way to return it to the store. Officer Klitch patted down Oviedo to confirm that he did not have any weapons, handcuffed him, sat him on the curb away from his vehicle and told Oviedo that he was not under arrest, but was being detained. Officer Klitch then proceeded to search Oviedo's truck. Klitch discovered a hole in the seat cover in the area where Oviedo had been reaching. Beneath the seat cover Klitch found a glass pipe with residue and a crystal substance which he recognized as methamphetamine. He also found on the seat a clear plastic baggy with crystal residue. The substances tested positive for methamphetamine and Oviedo was thereafter arrested for possession of a controlled substance.

The State charged Oviedo with possession of methamphetamine. Oviedo filed a motion to suppress, arguing that the search of his vehicle violated his constitutional rights. At an evidentiary hearing the district court took notice of the preliminary hearing transcript, Officer Klitch again testified, and a videotape of the encounter was introduced into evidence. The district court then denied Oviedo's motion. Oviedo entered a conditional plea of guilty preserving his right to appeal the district court's denial of his motion to suppress.

The standard of review of a suppression motion is bifurcated. When a decision on a motion to suppress is challenged, we accept the trial court's findings of fact that are supported by substantial evidence, but we freely review the application of constitutional principles to the facts as found. *State v. Atkinson*, 128 Idaho 559, 561, 916 P.2d 1284, 1286 (Ct. App. 1996). At a suppression hearing, the power to assess the credibility of witnesses, resolve factual conflicts, weigh evidence, and draw factual inferences is vested in the trial court. *State v. Valdez-Molina*, 127 Idaho 102, 106, 897 P.2d 993, 997 (1995); *State v. Schevers*, 132 Idaho 786, 789, 979 P.2d 659, 662 (Ct. App. 1999).

Oviedo argues on appeal that because Officer Klitch did not possess a reasonable suspicion that Oviedo was armed and dangerous the search of Oviedo's vehicle violated his constitutional rights. Therefore Oviedo claims the district court erred in finding that the search of the vehicle was justified for officer safety and in failing to suppress the evidence found pursuant to the search.

Traffic stops and automobile searches are subject to the Fourth Amendment prohibition of unreasonable searches and seizures. *Delaware v. Prouse*, 440 U.S. 648, 653 (1979). A warrantless search is deemed to be “unreasonable” per se unless it falls within one of the specifically established and well-delineated exceptions to the warrant requirement. *State v. Zapp*, 108 Idaho 723, 726, 701 P.2d 671, 674 (Ct. App. 1985) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)). One such exception was established by the United States Supreme Court in *Terry v. Ohio*, 392 U.S. 1, 24 (1968), where the Court held that a police officer who has justifiably detained a person for investigation of possible criminal activity may also frisk the individual for the officer’s own safety if the officer reasonably believes that the person may be armed and dangerous. *See also Zapp*, 108 Idaho at 726, 701 P.2d at 674.

In *Michigan v. Long*, 463 U.S. 1032 (1983), the Supreme Court held that a *Terry* frisk may include protective searches of automobiles for weapons. In that case, officers stopped a vehicle they had observed moving erratically and at excessive speed. The driver was dazed, unresponsive, and appeared to be under the influence of some substance. After having been removed from the car, the driver began to walk back toward his vehicle, where the officers had seen a long hunting knife on the floorboard. The officers stopped him and searched the vehicle for weapons. In upholding this search, the Supreme Court said:

[T]he search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on “specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant” the officer in believing that the suspect is dangerous and the suspect may gain immediate control of weapons. “[T]he issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.”

*Long*, 463 U.S. at 1049-50 (quoting *Terry*, 392 U.S. at 21, 27). Such a search is justified because law enforcement officers may be vulnerable to attack when investigating and detaining suspects who could immediately access weapons inside the vehicle. As we said in *State v. Muir*, 116 Idaho 565, 567, 777 P.2d 1238, 1240 (Ct. App. 1989): “[W]hen the officers had a reasonable belief that a suspect posed a danger and may gain immediate control of a weapon found inside a vehicle, the balance between the invasion of cherished personal security and the protection of the officers justified the protective search.” In analyzing the legality of a frisk,

we look to the facts known to the officers on the scene and the inferences of risk of danger reasonably drawn from the totality of those specific

circumstances. . . . [A]n officer carrying out a self-protective search “must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous.”

*Id.* (citations omitted) (quoting *Sibron v. New York*, 392 U.S. 40, 64 (1968)).

The issue here is whether the search of the vehicle driven by Oviedo was justified by the facts known to the officer at that time. The State cites to the following findings by the district court to argue the search was justified. After finding that the initial stop was valid, the district court found that when Officer Klitch initially approached the vehicle he observed Oviedo reaching for something. At that time Klitch told Oviedo to keep his hands visible. Klitch observed that Oviedo was acting extremely nervous, had bloodshot eyes, his eyelids were trembling and that his hands were shaking uncontrollably. Although the district court found that Officer Klitch did not yet have probable cause for an arrest, he possessed reasonable suspicion that Oviedo was under the influence of either alcohol or drugs. The district court further found that when Oviedo was told to exit the vehicle and to keep his hands visible he reached to the right in the middle of the seat as if to be reaching for something. This caused the officers to react “with a start” and to draw their weapons. Finally the district court found that Officer Klitch searched where a weapon could have been concealed in the area where Oviedo had been reaching. These findings are supported by substantial and competent evidence presented at the hearing on Oviedo’s motion to suppress, and we defer to said findings.

Oviedo argues however that his case is similar to *State v. Muir*, 116 Idaho 565, 777 P.2d 1238 (Ct. App. 1989) wherein this Court held that the officers were not justified in searching a vehicle when the two defendants had obeyed an order to exit the car and had not displayed any suspicious behavior while in the vehicle. The State directs us to *State v. Hanson*, 142 Idaho 711, 132 P. 3d 468 (Ct. App. 2006) and the analysis included therein for support of its position that the search here was justified.

We agree that these two cases are instructive setting forth factors to be considered and the analysis to be undertaken. However even accepting the findings of the district court set forth above we conclude that it was error to deny Oviedo’s motion to suppress.

Oviedo was stopped for a traffic infraction for failing to signal for a right hand turn. It was approximately 12:45 p.m. and in broad daylight, during the lunch hour and on a public street. Oviedo was alone in the vehicle and two more officers arrived on the scene to provide backup to Officer Klitch. Upon removing Oviedo from the truck Officer Klitch was handed a

video and was told that it was the video that Oviedo had been reaching for. Officer Klitch testified that he immediately frisked Oviedo “to make sure he didn’t have any weapons on him.” Oviedo was handcuffed and placed on the curb behind his vehicle. At that time Officer Klitch searched Oviedo’s truck.

The specific articulable facts and the reasonable inferences therefrom, fail to support the district court’s conclusion that Officer Klitch’s search of Oviedo’s vehicle for a weapon as part of a *Terry* stop was justified. As this Court concluded in *Muir* the officers had in effect removed any potential danger conceivably posed by Oviedo. The evidence does not show that at the time of the search Oviedo was either armed or dangerous or that he had immediate access to any weapons inside the vehicle. Therefore the district court erred in its denial of Oviedo’s motion to suppress.<sup>1</sup>

We reverse the district court’s denial of Oviedo’s motion to suppress and vacate his judgment of conviction. The case is remanded to the district court for further proceedings consistent with this opinion.

Judge GUTIERREZ, **CONCURS.**

Chief Judge LANSING, **SPECIALLY CONCURRING**

I write separately to further explain my determination that the *Terry* frisk of Lamberto Oviedo’s automobile was not compliant with the Fourth Amendment. As the majority opinion notes, the United States Supreme Court’s opinion in *Michigan v. Long*, 463 U.S. 1032, 1049-50 (1983), holds that such a search is permissible only when there is reasonable suspicion that the suspect is dangerous and “may gain immediate control of weapons.” *See also Arizona v. Gant*, \_\_\_ U.S. \_\_\_, 129 S. Ct. 1710, 1719 (2009) (holding that a search of a vehicle incident to a recent occupant’s arrest is permissible “only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search”). At the time of the search of Oviedo’s vehicle, Oviedo was handcuffed and seated on a curb. Consequently, even if the vehicle contained a weapon, at that point there was no risk that Oviedo could gain immediate control of it. Such a risk could have arisen only if, upon completion of their DUI investigation,

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<sup>1</sup> We note that the district court found that Officer Klitch did not have probable cause to arrest Oviedo for driving while under the influence and that no contraband was found in plain view. The State does not argue on appeal that either of these exceptions to the warrant requirement justified the search of Oviedo’s truck.

the officers had decided not to arrest Oviedo and to allow him to return to the vehicle. That did not occur.<sup>2</sup> Thus, even if the officers reasonably suspected the presence of a weapon, this search was not justified under the standards stated in *Long*, 463 U.S. 2032, because Oviedo had no immediate access to the interior of the vehicle.

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<sup>2</sup> Oviedo was eventually charged with DUI in addition to possession of a controlled substance.